



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

ONE ASHBURTON PLACE, ROOM 411
BOSTON, MASSACHUSETTS 02108
(617) 727-8352
(800) 462-OCPP

MARY F. MCTIGUE
DIRECTOR

December 30, 1993
AO-93-36

Robert W. Healy, City Manager
City Hall
City of Cambridge
Cambridge, MA 02139

Re: City's Proposed Legal Challenge to Initiative Petition
Dear Mr. Healy:

This letter is in response to your recent request for an advisory opinion concerning a proposed legal challenge by the City of Cambridge (the City) to Initiative Petition No. 93-19, regarding prohibition of rent control.

You have stated that the City is contemplating a legal challenge to the attorney general's certification of the initiative petition. You have asked if the City's participation in this type of legal challenge is consistent with the ruling of the Supreme Judicial Court in Anderson v. City of Boston, 376 Mass. 178 (1978).

Anderson's prohibition against municipalities making political expenditures to influence or affect a vote is clearly distinguishable from the legal activity contemplated by the City, and for the reasons which follow, it is the opinion of this office that Anderson does not prohibit the City's initiation of legal activity.

Section 1 of M.G.L. c. 55 defines "contribution" and "expenditure", in relevant part, as:

a contribution or expenditure of money or anything of value . . . for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters . . .

Contributions and expenditures by any person or entity are strictly regulated. Whether the legal expenditures contemplated by the City are "expenditures for the purpose of promoting or opposing" the initiative question, and thus subject to c. 55, is the gist of your inquiry.

Although the litigation contemplated by the City involves an expenditure by a municipality to "oppose" a referendum question, this type of opposition is not addressed by the Supreme Judicial Court in Anderson, and in

this office's opinion, is not within the scope of "opposition" as used in M.G.L. c. 55.

In Anderson, the Supreme Judicial Court held that the City of Boston could not appropriate funds to establish and staff an office for the purpose of publicly advocating a favorable vote on a referendum question which sought to change the method by which real estate was valued for property tax purposes. The City had developed an election strategy intended to influence voters to support the change in the status quo. The Court ruled that the City's actions violated M.G.L. c. 55, since

[c. 55 was] intended to reach all political fundraising and expenditures within the Commonwealth. The absence of any reference to municipal corporations is significant, not as an indication that municipal action . . . be exempt from regulation, but rather as an indication that the Legislature did not even contemplate such municipal action could occur.

376 Mass. at 186.

The Supreme Judicial Court, in disqualifying the City of Boston from campaigning against a statewide referendum, did not need to consider the question raised in your letter, i.e., whether a municipality can challenge the legality of a referendum question. The Court did state, however, that the "general legislative intent [of M.G.L. c. 55 was] to keep political fundraising and disbursing out of the hands of nonelective public employees and out of city and town halls." 376 Mass. 186-187.

The Court also rejected the City of Boston's argument that M.G.L. c. 55, s. 22A authorized the City's expenditure. Section 22A requires city, town or other governmental treasurers to report expenditures "made to influence or affect the vote on any question submitted to the voters." M.G.L. c. 55, s. 22A. The Court stated as follows:

We find in [s. 22A] no implication that municipalities may expend public funds to influence or affect the vote on a Statewide referendum. The requirement that a municipal treasurer report all expenditures of public funds for such a purpose does not mean that the Legislature has altered its position barring the use of such funds for political purposes. The section seemingly disclaims such an inference. Moreover, it acknowledges that there may be adjudications that such funds may have been spent contrary to law and authorizes the director to order restitution of such funds.

376 Mass. at 186. In a footnote, the Court (citing the Home Rule Amendment, Mass. Const. art. 89, s. 8) stated that it

was not concerned with the right of a municipality to expend funds to influence legislative action, and acknowledged that municipalities traditionally might seek such action. Id., n. 11. Similarly, the Court was not concerned with the right of a municipality to challenge the legality of a petition.

This office has not previously considered whether a city's initiation of litigation opposing a ballot question is permissible under c. 55. As noted in IB-90-02, however, determinations regarding whether the purpose of an expenditure is to influence a ballot question are made based "on very specific facts surrounding particular activities taking into consideration such factors as the stated or perceived purpose, style, tenor and timing of the expenditures in question."

In IB-90-02, we stated that "monies raised and spent in an effort to move forward [a question] which will influence the voters, such as a petition drive, are subject to the provisions of c. 55. . . [including] any expenditures made for services which relate to challenges made prior to certification by the Attorney General." IB-90-02 did not, however, attempt to distinguish expenditures traditionally made by cities, towns and other governmental agencies from expenditures by other organizations. Moreover, IB-90-02 did not examine the legality of municipal expenditures for litigation unrelated to any expenditures intended to influence the vote of the public on a ballot question.

The stated and perceived purpose of the proposed expenditures, as well as the tenor and timing of the expenditures in question, lead this office to conclude that the campaign finance law should not be read to prohibit the expenditures. The City apparently plans to make expenditures solely to obtain a decision regarding the legality of an initiative petition. The expenditures contemplated by the City are consistent with the provisions of the Home Rule Amendment and are not connected with any effort to influence the vote on Initiative Petition No. 93-19. Moreover, municipalities have traditionally had recourse to the courts to obtain declaratory relief in matters that pertain to cities and towns. The City contends that the Petition is an "incursion on municipal authority over local matters protected by both Article 48 and the Home Rule Amendment." A municipality should have the opportunity to present an argument in court which intimately relates to the constitutional rights of the municipality.¹

1. Even if the litigation which the City contemplates is not connected with an explicit effort to influence voters, the effort "opposes" the petition. Therefore, we urge you to publicly disclose your legal expenses. A Form CPF M22A is enclosed for your use.

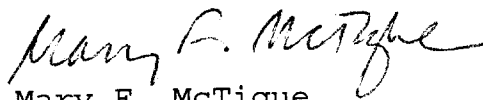
In summary, M.G.L. c. 55 does not limit a municipality's ability to initiate litigation contesting the legality of an initiative petition if the municipality does not initiate or use the litigation in order to influence the vote on the petition.

Nothing in this opinion should be interpreted to allow a municipality to make expenditures to influence voters. In particular, a legal action to challenge an initiative petition can not be used as a pretext to generate publicity or otherwise affect public opinion regarding an initiative petition.

This opinion has been rendered solely on the basis of the representations made in your letter and solely in the context of M.G.L. c. 55.²

Please do not hesitate to contact this office should you have additional questions.

Very truly yours,


Mary F. McTigue
Director

MFH/cp
Enclosure

². This office can only provide advice within the scope of the campaign finance law. You may wish to also consider other statutes limiting expenditures of the City. See, e.g., M.G.L. c. 40.